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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation;
ORACLE AMERICA, INC., a Delaware
corporation; and ORACLE INTERNATIONAL
CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;
SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-0106-LRH-PAL

**DEFENDANTS RIMINI STREET,
INC.'S AND SETH RAVIN'S REPLY IN
SUPPORT OF MOTION TO EXCLUDE
EXPERT TESTIMONY OF
ELIZABETH A. DEAN**

Trial Date: September 14, 2015

Oracle's proposed expert, Elizabeth Dean, offered two alternative methods of calculating damages resulting from Rimini Street's purported copyright infringement. Her primary analysis calculated a hypothetical license worth over \$200 million, and her alternative analysis calculated lost profits at under \$100 million. Dkt. 566; Declaration of Robert H. Reckers ("Reckers Decl."), Ex. A, Dean Rep. at 26 (Table 5). Her analysis under both theories was deeply flawed, and therefore Rimini Street moved to exclude Ms. Dean's testimony relating to these two methodologies in its *entirety*. Dkt. 563. In its Opposition Brief, Oracle *abandoned* its hypothetical license theory – the over \$200 million hypothetical license – as well as its income approach, claiming that it has done so to “streamline the issues for trial.” Opp. 2:14-19. Given this concession, the only theory for copyright infringement damages even available to Oracle at trial is for lost profits, though that theory should be excluded as well for the reasons set forth in Rimini's opening brief and as further explained in this Reply.

Significantly, Ms. Dean *admitted* in her expert report that lost [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As foreshadowed by her own admissions, Ms. Dean's lost profits calculation is fundamentally unreliable and should be excluded because her analysis of any “causal link” between copyright infringement and lost profits is purely “speculative.” *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708-10 (9th Cir. 2004); *Good Tech. Corp. v. MobileIron, Inc.*, 2015 WL 3882608 (N.D. Cal. June 23, 2015). Rather than include in her calculation only those customers that left Oracle because of alleged infringement by Rimini Street, Ms. Dean devised a vastly over-inclusive model for determining which lost customers to include, such as *every* Oracle customer that became a Rimini Street customer. Ms. Dean ignored that many customers [REDACTED]

1 [REDACTED]
2 [REDACTED].
3 Failing to address these clear flaws in Ms. Dean's analysis, Oracle's Opposition resorts to
4 mischaracterizing Rimini Street's arguments, asserting that Rimini Street is seeking "a ruling that
5 Oracle cannot prove causation, as a matter of law." Opp. 1:14-18. Not so. Rimini Street is asking
6 this Court to exclude Ms. Dean's lost profits testimony, *because* the causation analysis disclosed in
7 her report is unreliable and irrelevant and therefore inadmissible under *Daubert v. Merrell Dow*
8 *Pharms.*, 43 F.3d 1311, 1320-22 (9th Cir. 1995), *remanded from* 509 U.S. 579 (1993). Whatever
9 *other* evidence Oracle can present to demonstrate causation at trial is not the subject of the present
10 motion.

11 Oracle also misstates the applicable legal standard, claiming in a footnote that it need not
12 satisfy a "but for" causation test. See Opp. 11:15-28. That is incorrect. Ninth Circuit authority is
13 clear that Oracle bears the burden of demonstrating it would have earned the allegedly lost profits
14 **but for** the infringing activity. *Polar Bear*, 384 F.3d at 710; *Mackie v. Rieser*, 296 F.3d 909, 914
15 (9th Cir. 2002); see *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 108 (2d Cir. 1999) ("In the absence of
16 convincing evidence as to the volume of sales that plaintiff would have obtained but for the
17 infringement, the measure of lost profits may be rejected as too speculative") (quoting 4 Melville
18 B. Nimmer and David Nimmer, *Nimmer on Copyright* § 140.02[A], at 14-11 (1996)). And "mere
19 speculation does not suffice to link the losses to the infringement" to satisfy that burden. *Polar*
20 *Bear*, 384 F.3d at 710; *cf. also Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th
21 Cir. 1978) ("To obtain as damages the profits on sales he would have made absent the infringement
22 ..., a patent owner must prove ... the absence of acceptable noninfringing substitutes").¹

23 But speculation is all that Ms. Dean offers here. Indeed, Dean's report is riddled with
24 speculative assertions (ignored in Oracle's Opposition), none of which are sufficiently reliable such

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26 ¹ Indeed, the existence of a non-infringing alternative throughout the period of infringement, which is
27 not addressed here, is directly relevant to Oracle's burden to prove "but for" causation and will
likely be a highly contested issue at trial.

1 that a jury could reach a verdict in Oracle's favor based on that evidence. For example, Dean

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] this speculation is insufficient to establish a "causal
10 link between the infringement and" "lost profits" as a matter of law. *Polar Bear*, 384 F.3d at 708;
11 see also *Crunchyroll, Inc. v. Pledge*, 2014 WL 1347492, at *3 (N.D. Cal. Mar. 31, 2014) ("It is
12 entirely speculative" to assume that customers of infringer "would have" "automatically" become
13 customers of copyright holder absent infringement given customer preferences unrelated to
14 infringement). Rather, where, as here, the plaintiff cannot show that the loss of (or failure to gain) a
15 particular customer is attributable to infringement, it "cannot recover damages related to [that]
16 customer." *Polar Bear*, 384 F.3d at 708.

17 Oracle contends that Rimini Street does not challenge two out of three "components" of
18 Dean's lost profits analysis: (i) discounts Oracle gave to customers to prevent them from defecting,
19 and (ii) money Rimini Street *would have* paid Oracle to use its Database software. Opp. 2:3-13.
20 This, too, is false. Oracle cannot recover for these categories of damages absent a showing of
21 causation that any customers left Oracle because of Rimini Street's infringement, which it has not
22 demonstrated. Similarly, Oracle is incorrect that Rimini Street does not challenge Dean's analysis
23 of a hypothetical license with respect to the Oracle Database. Opp. 2:14-19. Rimini Street's
24 motion challenged the *entire* hypothetical license damages calculation, including the Oracle
25 Database. Dkt. 563 at 9:7 ("Dean's entire value of use calculations rely upon projections and
26 expectations"), 1:10-12 (challenging entire damages figure). And Oracle's conclusory assertion
27 that its Database "benchmark" is non-speculative and admissible ignores the non-infringing
28

1 alternatives available to Rimini Street and ignores Rimini Street's arguments that Dean improperly
2 assumed unreasonable economic behavior for all aspects of the hypothetical license claims. Dkt.
3 563 at 13:9-23. It also completely ignores the fact that the Ninth Circuit has never affirmed a
4 hypothetical license award in a lawsuit between two competitors.

5 Finally, Oracle's repeated plea that the Court should deny Rimini Street's motion because it
6 goes to the weight of the evidence, and not its admissibility, rings hollow. Ms. Dean should not be
7 permitted to testify on matters that could not support a jury verdict as a matter of law. *Polar Bear*,
8 384 F.3d at 710 (reversing jury verdict and remanding for new trial because lost profits award was
9 based on "pie-in-the-sky" speculative expert testimony). Such testimony is irrelevant and therefore
10 inadmissible under Rule 702. *See Daubert*, 43 F.3d at 1320-22. And in any case, the Court should
11 enter an order excluding evidence related to a hypothetical license and income approach, given that
12 Oracle has abandoned those theories, and it will not be part of Dean's testimony or the upcoming
13 trial.

14 Rimini Street therefore respectfully requests that this Court exclude any expert testimony of
15 Ms. Dean with respect to lost profits and fair market value damage theories.

16 DATED: August 5, 2015

SHOOK, HARDY & BACON

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18 By: /s/ Robert H. Reckers
19 Robert H. Reckers, Esq.
20 Attorney for Defendants
21 Rimini Street, Inc. and Seth Ravin
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEFENDANTS RIMINI STREET, INC.'S AND SETH RAVIN'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY OF ELIZABETH A. DEAN was filed, on August 5, 2015, with the Court's CM/ECF system which will send notice, via email, to all attorneys registered with the CM/ECF system.

/s/ Robert H. Reckers
Robert H. Reckers, Esq.